

PROPOSED DECISION

Agenda ID #12533 (Rev. 1)

Ratesetting

12/19/2013 Item 35

Decision PROPOSED DECISION OF ALJ BUSHEY (10/30/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.

Rulemaking 11-02-019
(Filed February 24, 2011)

FINAL DECISION IMPOSING SANCTIONS FOR VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

1. Summary

This decision finds that Pacific Gas and Electric Company (PG&E) violated Rule 1.1 of the Commission's Rules of Practice and Procedure by not correcting promptly a material misstatement of fact in a pleading filed with the Commission and by mischaracterizing the correction when filed as a routine and non-substantive correction. PG&E is fined \$6,750,000 for these violations.

2. Background

On July 3, 2013, Stephen L. Garber, Alejandro T. Vallejo, Jonathan D. Pendleton, and Joseph M. Malkin, representing Pacific Gas and Electric Company (PG&E), presented for filing with the Commission a document entitled "Errata to Pacific Gas and Electric Company's Supporting Documentation for Lifting Operating Pressure Restrictions on Line 101 and 147."

That document stated that the supporting information PG&E filed with the Commission on October 31, 2011 and November 15, 2011, to justify its request to lift operating pressure restrictions on Lines 147 and 101 contained errors. Specifically, the 2011 pipeline features calculation for Line 147 relied on PG&E records showing the pipeline contained Double Submerged Arc Welds or was seamless, with a resulting joint efficiency factor of 1.0. In its July 2013 document, PG&E revealed it had subsequently discovered that the pipeline actually had Single Submerged Arc Welds, with a joint efficiency factor of 0.8. The lower joint efficiency factor reduced the pipeline's Maximum Allowable Operating Pressure (MAOP) from 365 pounds per square inch gauge (psig), as approved in Decision (D.) 11-12-048, to 330 psig.

The 2013 document also stated that the pipeline had been pressure tested to a minimum of 612 psig, and a spike test of 669 psig, in 2011 and that PG&E was operating it at an MAOP of 330 psig.

The 2013 document stated that the Line 101 features MAOP of 365 relied on a 1989 pressure test to 650 psig. PG&E explained that under a then-applicable but subsequently repealed section of federal regulations it should not have relied on the 1989 pressure test. Consequently, PG&E concluded that the correct pipeline feature MAOP was 300 psig, not the 365 approved by the Commission in D.11-12-048.

The Commission's Docket Office rejected the July 3, 2013, document for filing on August 2, 2013, as untimely to the extent that it sought to make a substantive change to issues in a previously filed document which the Commission had resolved by decision.

3. Order to Show Cause Ruling

On August 19, 2013, the Chief Administrative Law Judge and the assigned Administrative Law Judge issued their Ruling Directing Pacific Gas and Electric Company to Show Cause Why It Should Not be Sanctioned for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure (Rules).

In their ruling, the Judges stated that PG&E's July document raised procedural issues because parties are not allowed to file pleadings for the purpose of correcting minor typographical or computational errors in previously filed applications. The Judges observed that in the July filing PG&E appeared to be revealing that it had made a substantial error in its application, but that titling the document an "errata" appeared to be an unreasonable procedural choice.

The Judges explained that the record in this proceeding and others demonstrated that the accuracy of PG&E's natural gas transmission pipeline records has been and remained an extraordinarily controversial issue with intense public interest. The facts stated in PG&E's July filing appeared to directly implicate this issue, and that submitting information of on-going record-keeping errors in a routine-appearing document could be seen as an attempt to mislead the Commission and the public on the significance of the new information.

The Judges ordered PG&E to appear at a hearing and show cause why it should not be sanctioned for violating Rule 1.1. Pursuant to Public Utilities (Pub. Util.) Code § 2107 the Commission may impose penalties for each offense, if found to be supported by evidence at hearing, of not less than \$500 no more than \$50,000 for each offense.

Also on August 19, 2013, the assigned Commissioner and assigned Administrative Law Judge issued their ruling directing PG&E to Appear and Show Cause Why All Commission Decisions Authorizing Increased Operating

Pressure Should Not be Stayed Pending Demonstration that Records are Reliable. As required by that ruling, on August 30, 2013, PG&E filed and served the verified statement of its Vice President of Gas Transmission Maintenance and Construction setting forth the timeline of PG&E's discovery of the errors in its 2011 Supporting Information and its subsequent actions. The Verified Statement explained that after discovering and investigating the errors in late 2012, it reported the corrected pipe specifications to Commission Safety and Enforcement Staff on March 20, 2013.

4. Order to Show Cause Hearing

On September 6, 2013, the Judges, along with assigned Commissioner Florio, and Commissioners Sandoval and Ferron, convened the hearing. PG&E presented its Lead Counsel who testified that he decided to title the document an errata after reviewing the Commission's Rules of Practice and Procedure, as well as the Ordering Paragraphs of D.11-12-048.¹ The Lead Counsel stated that PG&E had an "absolute obligation" to bring to the Commission's and the parties' attention that PG&E had found an error in its presentation to the Commission.² The Lead Counsel referenced the verified statement of PG&E's Gas Transmission Vice President admitting that PG&E was aware of the errors in the Line 147 application in October 2012.

PG&E's Lead Counsel was subject to cross examination by the parties and PG&E ended its evidentiary presentation at the conclusion of the hearing.

Parties submitted recommendations for Commission action on September 26, 2013, and replies on October 1, 2013. The Utility Reform Network

¹ Transcript at 2347-52.

² Transcript at 2357.

and the Office of Ratepayer Advocates recommended a fine of \$12,700,000 calculated by using the statutory maximum of \$50,000 from Pub. Util. Code § 2107 multiplied by 253 days from the time PG&E discovered that its application to the Commission contained errors, plus \$50,000 for filing the document as an errata. Safety and Enforcement Division recommended a fine of \$75,000 but relied on § 2110.³ The City of San Bruno supported all the fine recommendations and also sought to have PG&E's legal team separately fined and that PG&E be prohibited from reimbursing the law firm for the expenses. PG&E contended that no fine was warranted because it had acted in good faith and that specific intent to mislead the Commission was required to find a Rule 1.1 violation.

5. The Commission's Rules of Practice and Procedure

Rule 1.1 states that any person who transacts business with the Commission agrees to "never mislead the Commission or its staff by an artifice or false statement of law or fact."

Rule 1.12(a) defines an amendment to a document as making "a substantive change to a previously filed document" and requires that all amendments be filed prior to issuance of the scoping memo. The time for other parties to file responsive documents to amendment runs from the date of filing the amendment as provided in Rule 1.12(b).

Rule 1.12(c) prohibits the filing of documents that correct minor typographical or wording corrections that do not alter the substance of the previously filed document.

³ As PG&E noted in its Reply Comments at 15, this section of the Public Utilities Code pertains to persons found guilty of a misdemeanor and is not the section the Commission is proceeding under at this time.

Rule 16.4 sets forth the procedure for seeking to modify an issued Commission decision based on allegations of new or changed facts.

6. Discussion

Pursuant to Pub. Util. Code § 451, each public utility in California must “furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities, . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.” Ensuring that the management of investor-owned gas utility systems fully performs its duty of safe operations is a core obligation of this Commission.

In this proceeding, the Commission and the parties have been reviewing and modifying regulatory obligations for recordkeeping for over two years:

This Commission is currently confronting the most deadly tragedy in California history from public utility operations. We are resolute in our commitment to improve the safety of natural gas transmission pipelines. In this context, it is absolutely essential that our regulated utilities display the highest level of candor and honesty. We understand that the issues at hand implicate substantial expenses and capital investments, and that the optimum means to address these safety issues may be subject to reasonable debate. To perform our Constitutional and statutory duties, we must have forthright and timely explanations of the issues, as well as comprehensive analysis of the advantages and disadvantages of potential actions. Attempts at legal exculpation have no place in our proceedings to address these urgent issues.

PG&E needs to rebuild the Commission’s and the public’s trust in the safety of its operations. The directives in today’s decision are necessary steps to ensure safe operations and to restore public trust.

As the detailed history set out above shows, this project to validate MAOP was set in motion by the NTSB’s justifiable

alarm at PG&E's records being inconsistent with the actual pipeline found in the ground in Line 132. The pipeline features data for Line 132 were not missing; the recorded data were factually inaccurate. Records containing inaccurate pipeline features are fundamentally different from simply missing records. Curing PG&E's unreliable natural gas pipeline records was the obvious goal of the NTSB's recommendation to obtain "traceable, verifiable, and complete" records and, with reliably accurate data, calculate a dependable MAOP.⁴

The essential facts are not disputed. On October 31, 2011, and November 15, 2011, PG&E supplied its supporting information to increase its MAOP on Lines 101, 132A, and 147 to 365 psig. This information included "pipeline features list showing each component and its characteristics."⁵ On October 18, 2012, PG&E discovered that certain components of the pipeline features list were wrong, resulting in a lower MAOP of 330 psig. Among the errors discovered, was that Line 147 segments 103, 103.1 and 103.6 were not seamless pipeline but rather Single Submerged Arc Welded, as was Line 147 segment 109 which had been incorrectly recorded as Double Submerged Arc Weld.⁶

On March 20, 2013, PG&E informed Commission staff of its error and the results of its investigation and correction of the pipeline features calculation.

PG&E informed parties to this proceeding of these errors and the new maximum value on July 3, 2013, when it circulated a document titled errata to the

⁴ D.11-06-017 at 16 - 17.

⁵ D.11-12-048 at 4.

⁶ The pipeline segment involved in the San Bruno rupture and explosion was similarly incorrectly recorded as seamless, when in fact it was not.

parties and presented it for filing with the Commission. The Commission rejected the document for filing on August 2, 2013.

At the Order to Show Cause hearing PG&E admitted that it had an “absolute obligation” to bring the errors it had discovered to the attention of the Commission staff and the parties to this proceeding. PG&E presented this information to staff on March 20, 2013.

6.1. Rule 1.1 – Delay in Correcting Record

PG&E submitted a pipeline features list that contained inaccurate pipeline features in October of 2011, and upon which the Commission relied in issuing D.11-12-048 and setting the MAOP at 365 psig. On October 18, 2012, PG&E discovered the errors and corrected the MAOP to 330 psig for its actual pipeline operations, but did not inform the parties or attempt to correct the record until July 3, 2013.

As set forth above, the errors discovered included pipeline incorrectly recorded as seamless, a fact pattern distressingly similar to San Bruno. It is not credible that PG&E’s engineers and executives did not recognize the provocative nature of these facts in light of the intense public interest in natural gas pipeline safety. This is particularly true where, as here, Line 147 had been the subject of a pressure increase proceeding at the Commission the previous year.

Nevertheless, PG&E opted to delay until July 3, 2013, the public filing of the information correcting its October 30, 2011, supporting information on which the Commission had relied in issuing D.11-12-048. This unreasonable delay in correcting a known error in a significant and material factual representation to the Commission had the effect of misleading the Commission and the public for each day that PG&E allowed the erroneous information to persist.

As discussed above, to perform our Constitutional and statutory duties, we must have forthright and timely factual information. We find that PG&E has failed to present us with timely corrections to its Supporting Information. Therefore, we conclude that PG&E has violated Rule 1.1 by allowing known errors to persist without correction in its Supporting Information for Line 147 on file with the Commission. PG&E's conduct in allowing a known error to persist reflected a lack of care and conscience indifference to compliance with Rule 1.1. This grossly negligent conduct violated PG&E's obligation under Rule 1.1 to "never mislead Commission or its staff by an artifice or false statement of fact or law."

PG&E stated that it had completed its investigation of the correction to the Line 147 pipeline features by March 20, 2012, when it presented the correction to Commission Staff.

We find that PG&E's obligation to inform the parties to this proceeding of the error in its 2011 supporting information which was carried forward into D.11-12-048, began on that date. PG&E did not attempt to meet that obligation until July 3, 2013, a delay of 105 days.

6.2. Rule 1.1 – Titling the Document “Errata”

We begin by noting that the Commission's Rules of Practice and Procedure do not provide for a filing called an "errata" and that Rule 1.12(c) prohibits the filing of documents that correct minor typographical or wording corrections that do not alter the substance of the previously filed document, a purpose for which a document entitled errata has been historically used.

The record on Line 147 had been closed and the Commission decision issued. At a minimum the record needed to be re-opened and corrected, and for

a more complete resolution, D.11-12-048 should have been modified to reflect the correct maximum allowable operating pressure.

PG&E's Lead Attorney testified that there was "no question" that PG&E had to bring the errors "to the attention of the Commission and the parties."⁷ But he rejected using an Amendment to the original filing "because the proceeding was closed."⁸ He instead chose errata as he had "seen it used in rate cases to change numbers [and] in rate cases there is hardly anything that is more substantive than a number."⁹ The Lead Counsel concluded that errata is "literally a list of errors and corrections, and that is exactly what we submitted."¹⁰

This testimony is not credible because it is not logical. The Lead Counsel, with decades of experience, admits that notice of the corrections was "absolutely required." Then, he dismissed an amendment, because the record was closed; but the record was equally closed for the errata. No explanation was offered for this flawed logic.

The obvious solution to a closed record is a motion to reopen the record, which apparently was not considered, notwithstanding the admitted need to give notice, presumably on the record. Similarly, the other alternative for post-decision relief, a petition for modification, was rejected with a complicated analysis suggesting that the Ordering Paragraphs, when read together, did not require modification.¹¹

⁷ Transcript at 2348.

⁸ *Id.*

⁹ Transcript at 2350.

¹⁰ Transcript at 2351.

¹¹ Transcript at 2348 – 50.

In sum, the Lead Counsel chose a document title which, while not provided for in the Rules of Practice and Procedure, is typically used to inform parties of minor changes and corrections in documents, most commonly prior to the original document being offered for the record. This title had the effect of concealing from the parties the actual nature of the document. The ensuing level of controversy caused by the issues revealed in the July 3, 2013, document stand in stark contrast to the routine-sounding title chosen by the Lead Counsel. The explanation offered by the Lead Counsel for his selection of the title is not persuasive because it is logically flawed.

Therefore, we find that the document presented by PG&E for filing with the Commission on July 3, 2013, did not clearly convey the nature of the facts set forth within, and created a false impression of insignificance. Such a false impression could have misled the parties and the Commission.

As set forth above, PG&E has been on notice since June of 2011 that its presentations to this Commission and the public on natural gas transmission system safety must be forthright and timely. Today, we find that PG&E's attempted July 3 filing was neither forthright nor timely, and PG&E's conduct in attempting to file a document that created the false impression of routine or noncontroversial contents reflected a lack of care and conscience indifference to compliance with Rule 1.1. This grossly negligent conduct violated PG&E's obligation under Rule 1.1 to "never mislead Commission or its staff by an artifice or false statement of fact or law."¹²

¹² In its brief, PG&E argues that we must find specific intent to violate Rule 1.1. The Commission addressed that issue in D.01-08-019 and found that intent should be considered as an aggravating factor in determining the range of the fine. The unique factual history of this matter – the worst tragedy in Commission history, specific

Footnote continued on next page

This attempted filing remained pending for 30 days during which time PG&E could have withdrawn and corrected it. We find that this constitutes a continuing violation within § 2108. Thus, we conclude that PG&E's violation persisted for 30 days.

Calculation of Fine

Pursuant to § 2109¹³ all acts of an officer of employee acting within the scope of employment are the acts of the public utility. Each day's continuance of a continuing violation is a separate and distinct offense as provided in § 2108. The Commission may impose a fine of up to \$50,000 for each offense, § 2107.

As stated in D.98-12-075, the Commission considers two general factors in determining a fine: (1) the severity of the offense; and (2) the conduct of the utility. In addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent.¹⁴

Here, the facts of this proceeding require that we impose the maximum fine. Natural gas transmission system safety by this operator has been one of the Commission's highest priorities for three years. The management and legal decision-making reflected in the record regarding the treatment of the discovery

directive for forthright and timely information, admitted need for notice – already put the fine at the highest levels. The Lead Counsel has also admitted that the choice of title was intentional; that is, he intended to and did title the document errata. Accordingly, we need not and do not consider whether specific intent was an aggravating factor in this instance.

¹³ All citations are to the Public Utilities Code unless otherwise indicated.

¹⁴ In deciding the amount of a penalty, the Commission also considers the sophistication, experience and size of the utility; the number of victims and economic benefit received from the unlawful acts; and the continuing nature of the offense. (See D.98-12-076, mimeo. at 20-21.)

of errors the Line 147 Supporting Information is profoundly disheartening in that it reflects a lack of candor and appreciation of the public interest.

Therefore we tabulate the fine as follows: For delay in filing, we impose the maximum amount \$50,000 per day as a continuing violation aggravated by the severity of this safety-related offense and the conduct of the utility. We begin the tabulation at the day PG&E first became obligated to inform the parties of the error in its representations to the Commissions, March 20, 2013, a delay of 105 days. We assess the maximum statutory value of \$50,000 per day for this continuing violation based on the history of this proceeding as set forth above. The resulting fine is \$5,250,000.

For submitting a misleadingly titled document, \$50,000 per day for 30 days it remained pending at the Commission, when PG&E could have retrieved and corrected it = \$1,500,000. Total fine= \$6,750,000.

7. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge Maribeth A. Bushey in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code and comments were allowed under Rule 14.3. Comments were filed on November 19, 2013, and reply comments were filed on November 25, 2013, by PG&E, ORA, SED, TURN, the City of San Bruno, the City and County of San Francisco, and Southern California Gas Company and San Diego Gas and Electric Company.

In addition, Oral Argument was requested by PG&E and held in the Commission's San Francisco offices on December 2, 2013. PG&E, ORA, SED, TURN, the City of San Bruno, and the City and County of San Francisco participated.

PG&E argued that the scope of the Order to Show Cause ruling was narrowly defined, and limited only to the misuse of the word “errata” in the title of the document, and the circumstances of filing the document on July 3, 2013, the day before the fourth of July holiday weekend.

The Order to Show Cause ruling was not so narrowly worded and put PG&E on notice that all issues arising from PG&E’s failure to inform the Commission in a forthright and timely manner would be within the scope of the hearing.¹⁵

PG&E’s argument about the “intent” element a Rule 1.1 violation is addressed elsewhere in today’s decision.

Southern California Gas Company and San Diego Gas and Electric Company argued that by calculating penalties from the day that a utility informed Commission staff of an error in its pipeline system to the day that the utility submitted a formal filing with the Commission the Proposed Decision discourages utilities from communicating openly and candidly about conditions discovered on their systems prior to making formal filings with the Commission, and that the Proposed Decision contains insufficient findings relative to its issuance of a Rule 1.1 violation because a finding that the Commission was either intentionally misled or misled through reckless or grossly negligent conduct is required. The findings have been revised in accord with these comments.

Comments of the other parties generally support the proposed decision. We have made revisions where appropriate as suggested by the comments.

¹⁵ The Order to Show Cause (OSC) ruling specifically states that, “[a]ttempting to correct an application 18 months after the Commission issued a decision appears to be an unreasonable procedural choice” (OSC ruling at 4), and thus expressly raises the issue of PG&E’s delay in filing.

8. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Maribeth A. Bushey is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On August 19, 2013, the Chief Administrative Law Judge and the assigned Administrative Law Judge issued their Ruling Directing PG&E to Show Cause Why It Should Not Be Sanctioned by the Commission for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.

2. On September 6, 2013, the Commission convened a hearing and PG&E presented its Lead Counsel as a witness.

3. The Lead Counsel testified that he selected the title of the document presented to the Commission on July 3, 2013.

4. The Commission's Rules of Practice and Procedure do not provide for a document titled Errata.

5. The record for the pressure increase on Line 147 was closed prior to the Commission issuing D.11-12-048 on December 19, 2011.

6. After a record is closed, the only filings permitted pursuant to the Commission's Rules of Practice and Procedure are a Petition for Modification or a Motion to Reopen the Record.

7. The representations by Lead Counsel that he chose an errata after rejecting an amendment to the Supporting Information filing is logically flawed because neither document can be filed after a record is closed.

8. By March 20, 2012, PG&E knew that it had made errors and had fully investigated in its Line 147 Supporting Information filed with the Commission on October 31, 2011 and November 15, 2011.

9. The natural gas transmission system safety procedures of PG&E have been one of the Commission's highest priorities for three years.

10. The management and legal decision-making reflected in the record regarding the treatment of the discovery of errors the Line 147 Supporting Information reflects a lack of candor and appreciation of the public interest.

11. PG&E's July 3, 2013, filing was neither forthright nor timely.

12. PG&E's July 3, 2013, filing created the false impression that the information contained within was routine and noncontroversial.

Conclusions of Law

1. The Lead Counsel's testimony as to his rationale for deciding to title the document errata was not credible.

2. PG&E's management knew or should have known that the information about errors in the Line 147 Supporting Information would be of great interest to the Commission, the parties, and the public.

3. PG&E's conduct in attempting to file a document that created the false impression of routine or noncontroversial contents reflected a lack of care and conscience indifference to compliance with Rule 1.1. This grossly negligent conduct violated PG&E's obligation under Rule 1.1 to "never mislead Commission or its staff by an artifice or false statement of fact or law."

4. The Commission should impose the maximum fine on PG&E for its actions with regard to the treatment of the discovery of errors the Line 147 Supporting Information.

5. PG&E should be fined as follows: For delay in filing, \$50,000 per day for 105 days = \$5,250,000. For submitting a misleadingly titled document, \$50,000 per day for 30 days it remained pending at the Commission = \$1,500,000. Total fine= \$6,750,000.

6. PG&E should be ordered to pay a fine of \$6,750,000.

O R D E R

THEREFORE, IT IS ORDERED that:

1. Pacific Gas and Electric Company must pay a fine of \$6,750,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 40 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision ____."

2. All money received by the Commission's Fiscal Office pursuant to the preceding Ordering Paragraph shall be deposited or transferred to the State of California General Fund as soon as practical.

3. The Order to Show Cause portion of this proceeding is closed.

4. The Rulemaking portion of this proceeding shall remain open.

This order is effective today.

Dated _____, at San Francisco, California.